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Tenaga Nasional Bhd v Calsonic Compressor (M) Sdn Bhd

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HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO MT(3)–22–554 OF 2008
ZAWAWI SALLEH JC
30 APRIL 2009

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Civil Procedure — Striking out — Application for — Whether issue raised one of law — Whether there were disputed facts which merit trial of action — Rules of the High Court 1980 O 18 r 19

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Public Utilities — Electricity — Charges for electricity — Faulty meter causing record of lesser units of electricity — Whether plaintiff entitled to claim for undercharged electricity consumption — Whether Energy Commission had jurisdiction to decide on dispute — Whether decision of Energy Commission was ultra vires therefore not binding on parties — Electricity Supply Act 1990 s 30 — Licensee Supply Regulations 1990 sub-reg 11(2) — Energy Commission Act 2001 s 14(1)(d) & (e)

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On 27 November 2001, the plaintiff and the defendant entered into an electricity supply agreement. On 26 October 2004, the defendant applied for an increase in the supply of electricity to its premises. When the plaintiff's representative visited the defendant's premises on 2 November 2004, pursuant to the defendant's request for an increase in its electricity supply, it was discovered that the original meter installed by the plaintiff had not been recording the actual unit of usage of electricity. On the same day, the original defective meter was replaced with a new meter and the defendant was billed for the correct sum of charges from that date, ie from 2 November 2004. These bills were duly settled by the defendant. On 28 March 2005, the plaintiff served on the defendant a notice informing the latter of the defect in the original meter installed by it and claimed RM2,110,792.53, which was the undercharged sum for the electricity supplied to the defendant. By way of a letter dated 14 April 2005, the defendant refuted the plaintiff's claim. The plaintiff vide a letter dated 8 June 2005 amended the sum claimed to RM316,144.22, based on a purported calculation of the bills for the months of August, September and October 2004. The defendant again refuted its liability to make such payments. The dispute was referred to the Energy Commission ('the Commission'), which under s 30 of the Electricity Supply Act 1990 ('the Act'), was conferred with the power to hear disputes between the plaintiff as the licensee and its customers. After hearing both the plaintiff

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and the defendant, the Commission found that the plaintiff was not entitled to claim the sum of RM316,411.22 from the defendant. The Commission's decision was based on the provisions of law that provided that the plaintiff could only claim for an undercharged sum for the period of three months from the date the defendant was notified of the said undercharged sum. Since the defendant had settled all its electricity bills after the installation of the new meter on 2 November 2004 until the date the defendant received the plaintiff's notice of claim, dated 28 March 2005 on 12 April 2005, there was no undercharged sum for the period of three months ie for the period of 12 January 2005 to 12 April 2005. The decision of the commission was conveyed to the plaintiff and defendant by way of a letter dated 8 November 2005. However, vide a letter dated 24 January 2007, the plaintiff once again claimed for the sum of RM316,411.22 from the defendant and thereafter on 24 January 2007 demanded the sum of RM2,110,792.53. On 28 July 2007, the plaintiff filed a writ of summons and statement of claim for the sum of RM2,110,792.53 against the defendant. The defendant filed its defence. This was an application under O 18 r 19(1) of the Rules of the High Court 1980 by the defendant to strike out the plaintiff's writ and statement of claim. At the hearing of this application, the plaintiff submitted that it was not appropriate for the court to consider the application to strike out the claim because there were serious and bona fide issues which merited a trial in this case. One of the issues for determination raised by the plaintiff was whether the plaintiff was entitled to claim from the defendant for alleged undercharging for electricity consumption due to the wrongful installation of the meter by the plaintiff's servants and/or agents in the defendant's premises. The plaintiff further submitted that the dispute relating to the undercharging of electricity did not fall under the jurisdiction of the Commission and that the latter did not have the authority to decide on the dispute brought before it by the defendant. In addition, the plaintiff submitted that the Commission's decision was not binding upon the parties because the Commission had acted in excess of its function and powers.

Held, allowing the defendant's application with costs:

(1) There is a plethora of weighty authorities to say that 'where the issue raised is one of the laws and it is clear-cut and can be decided upon, the judge hearing it should decide on it rather than let it go to trial'. In this case, having carefully scrutinised the facts of the case, it was clear that the sole dispute involved a question of statutory interpretation. The question of law to be resolved was whether the plaintiff's claim should rightfully come under sub-reg 11(2) of the Licensee Supply Regulations 1990 ('the Regulations'). As the interpretation of a statute and its application to undisputed facts are questions of law, it should be decided without the rigmarole of a full trial (see paras 6 & 8).

(2) Applying sub-reg 11(2) of the Regulations to the instant case, the reading of the consumer's meter shall be prima facie evidence of the amount of electricity consumed. As the plaintiff had referred to its conduct in wrongfully programming the original meter installed at the defendant's premises as a mistake, ie an incorrect meter reading for the purposes of sub-reg 11(2), it could be concluded that under the Regulations, the plaintiff had a right to claim against the defendant for the amount undercharged for the supply of electricity. However, the amended sub-reg 11(2) only allows undercharging of not more than three months from the date the defendant had been informed about being undercharged. As the defendant in this case was only informed of the undercharging on 12 April 2005, the plaintiff was only entitled to claim for the undercharged sum from the period 12 January 2005 till 12 April 2005. However, since the meter had been replaced since 2 November 2004 and the correct sum of charges had been billed to the defendant and duly settled by the defendant since that date, the plaintiff's claim for RM2,110,792.53 against the defendant was misconceived in law and unsustainable (see paras 10 & 12).

(3) As the commission was established by the statute, ie the Energy Commission Act 2001, it is settled law that the commission's powers, duties and authority are only those conferred expressly or impliedly by statute. Under s 14(1)(d) and (e) of the Energy Commission Act 2001, the commission is empowered to regulate all matters relating to the electricity supply industry. The dispute in the present case is regarding 'meter inaccuracy' or 'incorrect meter reading' and related to the supply of electricity. Hence the Energy Commission was conferred with the jurisdiction to hear the dispute and any party to the dispute may refer the dispute to the commission. Therefore, the contention by the plaintiff that disputes relating to the undercharging of electricity under sub-reg 11(2) of the Regulations did not fall within the Act was misplaced given the clear provision of the Act. Further, as the commission clearly stated its determination of the dispute was in accordance to s 30 of the Act and its interpretation should be accorded great weight deference. This is called the 'doctrine of operative construction' (see paras 16, 17, 22, 23, 25 & 26).

(4) The decision of the Commission was correctly decided and not ultra vires as contended by the plaintiff. The plaintiff's attempt in contending that the Commission's decision was ultra vires would appear to be an afterthought. The plaintiff should be estopped from asserting that the Commission's decision was not binding on the plaintiff. In the instant case, estoppel by silence arose because the plaintiff had the opportunity to make a challenge to the jurisdiction of the Commission but refrained from doing so, thereby leading the defendant to believe in an erroneous state of facts (see paras 33 & 35).

(5) Further, the plaintiff did not make any contemporaneous challenge as to the jurisdiction and authority of the Commission by way of judicial review. There was no doubt that the decision complained of, fell within the public law sphere and therefore judicial review laid against the Commission. However, the plaintiff having realised that it was out of time to file a judicial review on the decision of the Commission was now seeking to invalidate that decision in these proceedings which was not permissible. Only in a judicial review can it be determined whether the decision of the Commission was ultra vires of the Act but as the plaintiff had failed to do so, it was now precluded from raising that issue (see paras 36 & 38).

[Bahasa Malaysia summary

Pada 27 November 2001, plaintif dan defendan telah memasuki perjanjian bekalan elektrik. Pada 26 Oktober 2004, defendan telah memohon tambahan bekalan elektrik ke premisnya. Apabila wakil plaintif melawat premis defendan pada 2 November 2004, menurut permintaan defendan untuk menambah bekalan elektriknya, ia mendapati bahawa meter asal yang dipasang oleh plaintif tidak merekodkan unit sebenar penggunaan elektrik. Pada hari yang sama, meter asal yang rosak itu telah digantikan dengan meter baru dan defendan telah dibilkan jumlah caj sebenar daripada tarikh tersebut, iaitu 2 November 2004. Bil-bil tersebut telahpun diselesaikan oleh defendan. Pada 28 Mac 2005, plaintif telah menyampaikan ke atas defendan notis memberitahunya tentang kerosakan meter asal yang dipasang olehnya dan menuntut RM2,110,792.53, yang merupakan jumlah yang dikenakan bayaran kurang untuk elektrik yang dibekalkan kepada defendan. Melalui surat bertarikh 14 April 2005, defendan telah menyangkal tuntutan plaintif. Plaintif melalui surat bertarikh 8 Jun 2005 telah meminda jumlah yang dituntut kepada RM316,144.22, berdasarkan pengiraan bil-bil yang dimaksudkan untuk bulan-bulan Ogos, September dan Oktober 2004. Defendan sekali lagi telah menyangkal liabilitinya untuk membuat pembayaran-pembayaran tersebut. Pertikaian itu telah dirujuk kepada Suruhanjaya Tenaga ('Suruhanjaya'), yang mana di bawah s 30 Akta Bekalan Elektrik 1990 ('Akta'), telah diberikan kuasa untuk mendengar pertikaian-pertikaian antara plaintif sebagai pemegang lesen dan pelanggan-pelanggannya. Setelah mendengar kedua-dua plaintif dan defendan Suruhanjaya mendapati bahawa plaintif tidak berhak menuntut jumlah RM316,411.22 daripada defendan. Keputusan Suruhanjaya adalah berdasarkan peruntukan undang-undang yang memperuntukkan bahawa plaintif hanya boleh menuntut untuk jumlah yang dikenakan bayaran kurang untuk tempoh tiga bulan daripada tarikh defendan memaklumkan jumlah yang dikenakan bayaran kurang itu. Memandangkan defendan telah menyelesaikan kesemua bil-bil elektriknya setelah pemasangan meter baru

pada 2 November 2004 sehingga tarikh defendan menerima notis tuntutan, bertarikh 28 Mac 2005 pada 12 April 2005, tidak ada jumlah yang dikenakan bayaran kurang untuk tempoh tiga bulan, iaitu untuk tempoh 12 Januari 2005 hingga 12 April 2005. Keputusan Suruhanjaya telah disampaikan kepada plaintif dan defendan melalui surat bertarikh 8 November 2005. Walau bagaimanapun, melalui surat bertarikh 24 Januari 2007, plaintif sekali lagi telah menuntut jumlah RM316,411.22 daripada defendan dan berikutan itu pada 24 Januari 2007 menuntut jumlah RM2,110,792.53. Pada 28 Julai 2007 plaintif telah memfailkan writ saman dan penyataan tuntutan untuk jumlah RM2,110,792.53 terhadap defendan. Defendan telah memfailkan pembelaannya. Ini adalah permohonan di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 oleh defendan untuk membatalkan writ dan penyataan tuntutan plaintif. Semasa perbicaraan permohonan ini plaintif telah menghujahkan bahawa ia tidak sesuai untuk mahkamah mempertimbangkan permohonan untuk membatalkan tuntutan itu kerana terdapat isu-isu serius dan bona fide yang mewajarkan perbicaraan kes ini. Salah satu daripada isu-isu yang perlu ditentukan yang telah ditimbulkan oleh plaintif adalah sama ada plaintif berhak menuntut daripada defendan untuk bekalan elektrik yang dikatakan dikenakan bayaran kurang akibat pemasangan meter yang tidak betul oleh pekerja dan/atau ejen plaintif dalam premis defendan. Plaintif selanjutnya menghujahkan bahawa pertikaian berkaitan elektrik yang dikenakan bayaran kurang itu tidak terangkum di bawah bidang kuasa Suruhanjaya dan bahawa Suruhanjaya tidak mempunyai kuasa untuk memutuskan pertikaian yang dihadapkan kepadanya oleh defendan. Tambahan lagi plaintif menghujahkan bahawa keputusan Suruhanjaya tidak mengikat pihak-pihak kerana Suruhanjaya telah bertindak melampaui fungsi dan kuasanya.

Diputuskan, membenarkan permohonan defendan dengan kos:

(1) Terdapat banyak autoriti yang mengatakan bahawa 'where the issue raised is one of the laws and it is clear-cut and can be decided upon, the judge hearing it should decide on it rather than let it go to trial'. Dalam kes ini, setelah meneliti fakta kes, adalah jelas bahawa pertikaian hanya melibatkan persoalan pentafsiran statutori. Persoalan undang-undang yang perlu diselesaikan adalah sama ada tuntutan plaintif patut terangkum di bawah sub-peraturan 11(2) Peraturan-Peraturan Pemegang Lesen Bekalan 1990 ('Peraturan'). Memandangkan pentafsiran statut dan pemakaiannya terhadap fakta-fakta yang tidak dipertikaikan adalah persoalan-persoalan undang-undang maka ia patut diputuskan tanpa keperluan perbicaraan penuh (lihat perenggan 6 & 8).

(2) Dengan pemakaian sub-peraturan 11(2) Peraturan dalam kes ini pembacaan meter pelanggan patut dijadikan keterangan prima facie untuk jumlah elektrik yang digunakan. Memandangkan plaintif telah merujuk perbuatannya yang tidak betul dalam mengendalikan pemasangan meter asal di premis defendan sebagai satu kesilapan, iaitu pembacaan meter yang tidak betul bagi tujuan sub-peraturan 11(2), boleh disimpulkan bahawa di bawah Peraturan plaintif mempunyai hak menuntut terhadap defendan untuk jumlah yang dikenakan bayaran kurang untuk bekalan elektrik. Walau bagaimanapun, pindaan sub-peraturan 11(2) hanya membenarkan caj yang kurang tidak lebih daripada tiga bulan daripada tarikh defendan telah dimaklumkan tentang caj yang kurang itu. Memandangkan defendan dalam kes ini hanya dimaklumkan tenang caj yang kurang itu pada 12 April 2005 plaintif hanya berhak menuntut untuk jumlah yang dikenakan bayaran kurang dari tempoh 12 Januari 2005 hingga 12 April 2005. Walau bagaimanapun, memandangkan meter telah digantikan sejak 2 November 2004 dan jumlah betul bayaran telahpun dibilkan kepada defendan dan telahpun diselesaikan oleh defendan sejak tarikh itu, tuntutan plaintif sejumlah RM2,110,792.53 terhadap defendan merupakan salah tanggapan undang-undang dan tidak boleh dikekalkan (lihat perenggan 10 & 12).

(3) Memandangkan Suruhanjaya telah ditubuhkan oleh statut, iaitu Akta Suruhanjaya Tenaga 2001, ia adalah undang-undang tetap bahawa kuasa, tanggungjawab dan kuasa Suruhanjaya hanya diberikan secara nyata atau tersirat oleh statut. Di bawah s 14(1)(d) dan (e) Akta Suruhanjaya Tenaga 2001, Suruhanjaya diberi kuasa untuk mengawal semua perkara-perkara berkaitan industri bekalan elektrik. Pertikaian dalam kes ini adalah berkaitan 'meter inaccuracy' atau 'incorrect meter reading' dan berkaitan bekalan elektrik. Justeru itu Suruhanjaya Tenaga telah diberikan bidang kuasa untuk mendengar pertikaian dan mana-mana pihak kepada pertikaian itu boleh merujuk kepada Suruhanjaya. Oleh itu hujah plaintif bahawa pertikaian-pertikaian berkaitan elektrik yang dikenakan bayaran kurang di bawah sub-peraturan 11(2) Peraturan tidak terangkum dalam Akta telah disalahletakkan berdasarkan peruntukan jelas Akta. Bahkan, memandangkan Suruhanjaya dengan jelas menyatakan penentuannya tentang pertikaian adalah menurut s 30 Akta dan pentafsirannya patut dihormati. Ini dipanggil 'doctrine of operative construction' (lihat perenggan 16, 17, 22, 23 dan 26).

(4) Keputusan Suruhanjaya telah diputuskan sewajarnya dan tidak ultra vires seperti yang dihujahkan oleh plaintif. Percubaan plaintif dalam menghujahkan bahawa keputusan Suruhanjaya adalah ultra vires kelihatan seperti suatu yang telah difikirkan kemudian. Plaintif patut diestopkan daripada menegaskan bahawa keputusan Suruhanjaya tidak

mengikat plaintif. Dalam kes ini estopel secara tersirat wujud kerana plaintif mempunyai peluang untuk mencabar bidang kuasa Suruhanjaya tetapi enggan berbuat sedemikian, yang membawa kepada defendan mempercayai fakta-fakta sedia ada yang salah (lihat perenggan 33 & 35).

(5) Plaintif tidak membuat sebarang cabaran sewajarnya terhadap bidang kuasa dan kuasa Suruhanjaya melalui semakan kehakiman. Tidak diragui bahawa keputusan yang diadukan terangkum dalam skop undang-undang awam dan oleh itu semakan kehakiman adalah terhadap Suruhanjaya. Walau bagaimanapun, plaintif setelah menyedari bahawa ia tiada masa untuk memfailkan semakan kehakiman berhubung keputusan Suruhanjaya kini memohon untuk mentaksahkan keputusan tersebut dalam prosiding yang tidak dibenarkan. Hanya dalam semakan kehakiman ia boleh ditentukan sama ada keputusan Suruhanjaya adalah ultra vires Akta tetapi oleh kerana plaintif telah gagal berbuat demikian ia kini dihalang daripada menimbulkan isu tersebut (lihat perenggan 36 & 38).]

Notes

For a case on application for striking out, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 6695.

For a case on charges for electricity, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) para 1999.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 5 MLJ 773; [2008] MLJU 472, CA (refd)

Araprop Development Sdn Bhd v Leong Chee Kong & Anor [2008] 1 MLJ 783; [2008] 1 CLJ 135, CA (refd)

Attorney-General for Canada & Anor v Hallet & Carey Ld & Anor [1952] AC 427 (refd)

Ban Guan Sendirian Berhad v United Malaysian Steel Mills Berhad [1977] 2 MLJ 52, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Bank of New Zealand & Ors v Cemac Modular Industries Ltd & Ors [1972] NZLR 661, CA (refd)

Cheatley v The Queen (1972) 127 CLR 291, HC (refd)

Chung Khiaw Bank Ltd v Multidev Sdn Bhd & Ors [1979] 1 MLJ 93, HC (refd)

Cow v Casey [1949] 1 KB 474, CA (refd)

European Asian Bank AG v Punjab Sind Bank (No 2) [1983] 1 WLR 642, CA (refd)

Farrell v Alexander [1977] AC 59, HL (refd)

Food Corporation of India vs Kamadhenu Cattle Feed Industries AIR 1993 SC 1601 (refd)

Jaya Kumar v Subramaniam Mohana Krishnan & Anor [1987] 2 MLJ 432, HC (refd)

Law Pang Ching & Ors v Tawau Municipal Council [2002] 3 MLJ 326, ; [2009] MLJU 41, CA (refd)

Liu, Ren-Shuenn v Lee Chiu-Pin [1999] 2 CLJ 35, HC (refd)

Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph [1993] 2 MLJ 57; [1993] 2 CLJ 417, SC (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183; [1987] CLJ 182, SC (refd)

OSK & Partners Sdn v Tengku Noone Aziz & Anor [1983] 1 MLJ 179; [1983] 1 CLJ 288; [1983] CLJ 317 (Rep), FC (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309; [1996] 1 CLJ 257, CA (refd)

Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd [198] 1 MLJ ; [1985] 2 CLJ 97, HC (refd)

Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151; [1983] 1 CLJ 178; [1983] CLJ (Rep) 363, FC (refd)

Verral v Great Yarmouth Borough Council [1981] QB 202, CA (refd)

Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240, FC (refd)

Legislation referred to

Electricity Act 1999 s 30(1)
Electricity Supply Act 1990 ss 6(1), 24, 25, 26, 27, 28, 29, 30
Energy Commission Act 2001 ss 3(1), 14(1)(d), (e), 30
Licensee Supply Regulations 1990 r 11, 11(2), (2)(a), (c)
Rules of the High Court 1980 O 18 r 19, 19(1)(a), (b), (d)

Raja Saidatul Akhma Raja Lope (Abdul Rahman Saad & Associates) for the plaintiff.
R Ravindra Kumar (Raja, Darryl & Loh) for the defendant.

Zawawi Salleh JC:

INTRODUCTION

[1] Enclosure 12 is an application by the defendant under O 18 r 19(1)(a), (b) and/or (d) of the Rules of the High Court 1980 ('RHC') to strike out the writ of summons and statement of claim dated 28 July 2008 on the grounds that it discloses no reasonable cause of action or defence, or it is scandalous, frivolous or vexatious, or it is otherwise an abuse of the process of the court.

A BACKGROUND FACTS

[2] For a better appreciation of the defendant's application in encl 12, regard must be had to the background of the case. I will now narrate it briefly:

B 2.1 Tenaga Nasional Bhd ('the plaintiff') and Calsonic Compressor (M) Sdn Bhd ('CCM' and 'defendant') entered into an electricity supply agreement dated 27 November 2001 (please refer to exh MO-1 of the affidavit in support, affirmed by Masayoshi Okuda). The relevant terms of the agreement are as follows:

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> Clause 22 places a duty on TNB to be responsible for any damage or interruptions in supply of electricity and/or TNB equipments which was caused by accidents or mistakes by TNB.
>
> D Clause 14 of the conditions of supply for business/non-domestic consumers (which comes under the subheading 'Inspection by TNB', TNB may need to inspect and test all installations before connection of supply.

E 2.2 On 6 December 2001, the meter was installed at CCM.

2.3 The defendant applied for an increase in the supply of electricity through its consultant vide a letter dated 26 October 2004 (please refer to exh MO-2 of the affidavit in support affirmed by Masayoshi Okuda).

F 2.4 On 2 November 2004, the plaintiff's representatives came to CCM to conduct an examination based on the request for an increase in the electricity supply and had determined that the original meter installed by the plaintiff on 6 December 2001 had not been recording the actual unit of usage.

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2.5 After being silent for almost four months, the plaintiffs gave notice informing of the defect and claimed for RM2,110,792.53 which was the undercharged sum and also threatened to disconnect electricity supply to the defendant's premises vide a letter dated 28 March 2005 H (please refer to exh MO-3 of the affidavit in support, affirmed by Masayoshi Okuda).

2.6 The defendant vide a letter dated 14 April 2005 had refuted the plaintiff's claim (please refer to exh MO-4 of the affidavit in support affirmed by Masayoshi Okuda). I

2.7 The plaintiff vide a letter dated 8 June 2005 amended the sum claimed to RM316,144.22 based on a purported calculation of the bills for the months of August, September and October 2004 (please refer to exh MO-6 of the affidavit in support, affirmed by Masayoshi Okuda).

2.8 The defendant vide a letter dated 16 June 2005 refuted liability to make such payments (please refer to exh MO-7 of the affidavit in support, affirmed by Masayoshi Okuda).

2.9 The Energy Commission vide a letter dated 19 August 2005 heard both the plaintiff and defendant to determine the dispute (please refer to exh MO-9 of the affidavit in support affirmed by Masayoshi Okuda).

2.10 The plaintiff vide a letter dated 15 September 2005 claimed for the sum of RM316,144.22 even before the decision of the Energy Commission (please refer to exh MO-9 of the affidavit in support, affirmed by Masayoshi Okuda).

2.11 The Energy Commission vide a letter dated 8 November 2005 decided for the defendant and found that there is no basis to the plaintiff's claim (please refer to exh MO-10 of the affidavit in support, affirmed by Masayoshi Okuda).

2.12 The plaintiff vide a letter dated 24 January 2007 once again claimed for the sum of RM316,144.22 from the defendant (please refer to exh MO-11 of the affidavit in support, affirmed by Masayoshi Okuda).

2.13 Thereafter the plaintiff demanded the sum of RM2,110,792.53 vide a letter dated 9 June 2008 through their solicitors (please refer to exh MO-12 of the affidavit in support, affirmed by Masayoshi Okuda).

2.14 Subsequently, a writ of summons and a statement of claim dated 28 July 2008 was filed by the plaintiff.

2.15 The defendant filed their defence on 14 October 2008.

2.16 The defendant filed an application under O 18 r 19 of the Rules of the High Court 1980 to strike out the plaintiff's claim on 28 July 2008.

[3] So much for the factual background upon which this application rests. The facts are undisputed.

THE LAW ON O 18 R 19(1) OF THE RHC

[4] Puan Raja Saidatul Akhma Raja Lope, learned counsel for the plaintiff submitted that there are serious and bona fide issues which merit trial in this case and it is not appropriate for the court to consider the application to strike out the writ of summons and statement of claim at this juncture. These issues require full ventilation during the trial proper. 'The issues should be tried' she entreated. In support of her submission, learned counsel cited the celebrated case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 wherein Mohamed Dzaidin SCJ, delivering the judgment of the Supreme Court, stated at p 43:

The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson*, *Heywopd & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Ry Co*). It is cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson*, *Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivoulous or vexatious or that the defences raised are not arguable.

[5] Learned counsel further submitted that this court should be guided by the principle that binds judges in exercising their powers of striking out cases as laid down in the case of *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413; [1985] 2 CLJ 97 wherein Edgar Joseph Jr J (as he then was) stated at p 418 (MLJ):

> In considering the application now before me, which as I have said, is to strike out the plaintiff's writ of summons and endorsement of claim as being, inter alia, frivolous, vexatious and an abuse of the process of the court, I had kept in the forefront of my mind, the well-settled principle that it is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases (per Lord Herschell in *Lawrance v Lord Norreys*). It follows, that an order will be made only in cases when it is obvious that the claim is devoid of all merit or cannot possible succeed — *Willis v Earl Beauchamp*.

[6] With respect, learned counsel forgot that the issue raised is one of the laws and should be decided without the rigmarole of a full trial. There is a plethora of weighty authorities setting out this point. The principle as discernible from these cases is simply this: 'where the issue raised is one of the laws and it is clear-cut and can be decided upon, the judge hearing it should decide on it rather than let it go to trial'. To mention a few are as follows:

(i) *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309; [1996] 1 CLJ 257 (per Siti Norma Yaakob JCA (as Her Lady then was) at p 321:

> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question (see *Bank Negara Malaysia v Mohd Ismail & Ors*

[1992] 1 MLJ 400). Likewise, where the affidavit evidence discloses a dispute of facts, such fact must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

(ii) *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; [1987] CLJ 182 (per Hashim Yeop Sani SCJ (as he then was):

> … where the issue raised is solely a question of law and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under O 14 as in any other cases and decide on the question of law. This is even so if the issue of law is a difficult one.
>
> If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.

(iii) *Jaya Kumar v Subramaniam Mohana Krishnan & Anor* [1987] 2 MLJ 432 (per Thean J (as he then was)):

> This, it is submitted, is a triable issue and the case should therefore go to trial. I agree that this is an issue, but on reflection, I think such an issue can and should be disposed of now and I should not let it go to trial where the same point would be re-argued … It has been repeatedly held by the Court of Appeal in England that on an application under O 14 where the issue raised is one of law and it is clear-cut and can be decided upon, then the judge hearing it, or, upon an appeal, the Court of Appeal, should decide on it rather than let it go to trial.

(iv) *Verral v Great Yarmouth Borough Council* [1981] QB 202 at p 218 (per Roskill LJ (as he then was)):

> We have often said in this court in recent years that where there is a clear-cut issue raised in O 14 proceedings, there is no reason why the judge in chambers — or, for that matter, this court — should not deal with the whole matter at once. Merely to order a trial so that the matters can be re-argued in open court is to encourage the law's delays which in this court we are always trying to prevent.

(v) *European Asian Bank AG v Punjab Sind Bank (No 2)* [1983] 1 WLR 642 at p 654 (per Robert Goff LJ (as he then was)):

> Moreover, at least since *Cow v Casey* [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under O 14, even if the question of law is at first blush of some complexity and therefore takes a little longer to understand.

[7] The principles in (ii), (iii), (iv) and (v) above have general application. As Lord Green MR said in *Cow v Casey* at p 481, the court has precisely the same duty under O 14 as it has in any other case (see also *Liu, Ren-Shuenn v Lee Chiu-Pin* [1999] 2 CLJ 35; *Chung Khiaw Bank Ltd v Multidev Sdn Bhd & Ors* [1979] 1 MLJ 93; *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240; *Ban Guan Sendirian Berhad v United Malaysian Steel Mills Berhad* [1977] 2 MLJ 52).

[8] Having carefully scrutinised the facts of the case, to my mind, the sole dispute involves a question of statutory interpretation. The question of law to be resolved is whether the plaintiff's claim should rightfully comes under sub-reg 11(2) of the Licensee Supply Regulations 1990. The interpretation of a statute and its application to undisputed facts are questions of law.

[9] For easy reference, it will be necessary to reproduce reg 11 of the Licensee Supply Regulations 1990 in full. It reads as follows:

> Regulation 11. Metering of supplies.
>
> (1) The licensee shall provide and fix such meters as it considers necessary for the measurement of the supply of energy to a consumer. Where additional meters are installed by the licensee at the request of the consumer the charge as determined by the licensee shall be paid by the consumer.
>
> (2) The reading of the consumer's meter shall be prima facie evidence of the amount of electricity consumed, provided that in the event a consumer has been undercharged or overcharged as a result of:
>
> (a) meter inaccuracy;
>
> (b) malfunctioning of the meter or its associated installation or part thereof;
>
> (c) incorrect meter reading;
>
> (d) incorrect application of a meter multiplying constant;
>
> (e) cross-connection of installation to different accounts; or
>
> (f) faulty installation,
>
> the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation:

Provided that the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged.

(3) In the event that the supply of meters at any time is not equal to the demand, the licensee may make a fixed monthly charge for the supply of energy.

(4) The licensee shall give supply of electricity to the consumer at the prevailing tariff rates or any modifications thereof from time to time at the date of application pursuant to the provision of section 26 of the Act.

(5) Where a consumer has been granted a supply of electricity and levied a particular tariff for such supply and subsequently discovered that a different tariff should have been levied or if the consumer converted his category from domestic to business or changed his business to a different kind of nature in which such change requires a different category of tariff to be imposed, the licensee shall be entitled to make retrospective adjustments to the consumer's account in respect of the tariff of the period in question subject to the reference to the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances:

Provided that the period for such retrospective adjustments shall not exceed three months from the date of the licensee or the consumer has been informed of the discovery or charges.

(6) When a situation under subregulation (4) or (5) occurs, the licensee and the consumer shall as soon as possible enter into an agreement to give effect to the actual tariff.

(7) In the event the consumer refuses to enter into an agreement as mentioned under subregulation (6), the licensee shall have the right to disconnect the supply from the said premise after giving fourteen days prior written notice to the consumer of its intention to do so.

[10] Now, apply that sub-reg 11(2) to the facts of this case. Here you have a provision which clearly states that the reading of consumer's meter shall be prima facie evidence of the amount of electricity consumed. The plaintiffs have time and again referred to the conduct by TNB in wrongfully programming the meter as 'mistake'. The result of this 'mistake' is obviously 'meter inaccuracy' (para (a) of sub-reg 11(2)); which in turn give 'incorrect meter reading' (para (c) of sub-reg 11(2)). There is no doubt that the dispute is in respect of the accuracy of the amount of electricity consumed by the respondent.

[11] A similar view was expressed in *Tenaga Nasional Bhd v Teck See Plastic Sdn Bhd* [2007] 5 MLJ 430; [2007] 9 CLJ 161. One of the issues for determination in this case is whether the plaintiff is entitled to claim from the defendant for an alleged 'underbilled' electricity consumption due to the wrongful installation of the meter by the plaintiff's servants and/or agent at the defendant's premises. Mariah Ahmad J held at p 438 (MLJ); p 169 (CLJ):

> [30] Regulation 11(2) states that 'The reading of the consumer's meter shall be prima facie evidence of the amount of electrical energy consumed, provided that should the supply registered by the meter at any time is not equal to the energy consumed or the meter is not registering the actual consumption due to fault installation, the licensee may make a charge for the supply of energy'. Finally reg 11(3) states that 'In the event that the supply of meters at any time is not equal to the demand, the licensee may make a fixed monthly charge for the supply of energy'.
>
> [31] Therefore it can be concluded that the Licensee Supply Regulations 1990 permits the plaintiff to raise a claim against the defendant for the amount undercharged for the supply of electrical energy as stated in a similar unreported High Court case of *Hock Seng Company Sdn Bhd v Tenaga Nasional Berhad* [2000] MLJU 571 it was held '… Oleh itu, menurut peruntukan Peraturan-Peraturan Bekalan Pemegang Lesen 1990 (khasnya peraturan (3) dan (12)). Defendan adalah berhak terhadap caj tambahan bagi penggunaan tenaga elektrik yang tidak atau gagal direkod dan plaintif tidak boleh mengatakan atau menimbulkan alasan bahawa defendan diestop daripada menuntut bayaran bagi penggunaan elektrik yang tidak direkod'.
>
> [32] It must however be noted that the amended reg 11(2) only allows undercharging of not more than three months from the date the consumer has been informed about being undercharged.

[12] In this instant case, the plaintiff is entitled to raise a claim against the defendant for the amount undercharged for the electricity energy supplied notwithstanding that the undercharging was due to the mistake in programming the meter by TNB and/or its agent/servant. However, the amount of time for which the plaintiff can claim arrears is limited to three months only from the date the defendant has been informed about being undercharged. The defendant was notified of the undercharged on 12 April 2005. Therefore, the plaintiff is only entitled to claim for the undercharged sum for three months from 12 April 2005. In other words, the plaintiff is entitled to claim for the undercharged sum from the period of 12 January 2005 till 12 April 2005. However, there was no undercharged sum demanded by the plaintiff for the period of 12 January 2005 to 12 April 2005. The

defendant had replaced the meter since 2 November 2004 and the correct sum of charges had been billed to the defendant and duly settled by the defendant since that date. In my judgment, the plaintiff's claim for the sum of RM2,110,792.53 is misconceived in law and unsustainable.

[13] A similar decision was made by the Energy Commission. As can be been from the facts of the case, the Energy Commission had invited both, the plaintiff and defendant to attend a meeting to determine the dispute to the said claim vide a letter dated 19 August 2005. A hearing was held on 25 August 2005, between the Energy Commission, the plaintiff and the defendant. After hearing both the plaintiff and defendant, and having considered the dispute, the Energy Commission found that the plaintiff's claim against the defendant was misconceived. During the hearing of the dispute, the plaintiff's representatives had stated that the mistake in the installation of the meter was discovered on 2 November 2004 and the same was replaced with a new meter on 2 November 2004. The plaintiff had further stated that its mistake was only discovered during inspection on 2 November 2004 which was carried out pursuant to the defendant's request for an increase in electricity supply.

[14] The Energy Commission found that the plaintiff was not entitled to claim for the sum of RM316,411.22 from the defendant. According to the Energy Commission, based on the provisions of law, the plaintiff can only make a claim for an undercharged sum for the period of three months from the date the defendant was notified of said undercharged sum. However, the defendant had settled all electricity bills after the installation of the new meter on 2 November 2004 until the date the defendant received the plaintiff's notice of claim dated 28 March 2005 on 12 April 2005. There was no undercharged sum for the period of three months preceding the date the defendant was notified of the undercharged as the bills charged during the three months were based on the new meter that had been installed by the plaintiff. The decision of the Energy Commission was conveyed to the plaintiff and defendant via a letter dated 8 November 2005.

[15] Learned counsel for the plaintiff submitted that the disputes relating to undercharging of electricity did not fall under the jurisdiction of the Energy Commission and hence it was argued that the Commission did not have the authority to decide on the dispute brought before it by the defendant. Reference was made to sub-s 30(1) of the Electricity Act 1999, which reads as follows:

> Determination of dispute
>
> (1) Any party to any dispute under sections 24 to 29 regarding a supply of electricity may refer the dispute to the Commission.

A According to learned counsel, it would appear from the reading of sub-s 30(1) above that only parties to the dispute under ss 24 to 29 of Act 447 may refer to the Commission for determination. The dispute relating to undercharging of electricity is not one of the matters covered by those sections.

B

[16] Now, the Energy Commission was established by the statute, ie the Energy Commission Act 2001 (Act 610); with powers 'to regulate the energy supply activities in Malaysia and to enforce the energy supply laws and for matters connected therewith' (see long title of the Act). It is a body corporate C with a perpetual succession and a common seal, and which may be sued in its corporate name (see s 3(1)). It is settled law that the powers of a statutory corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its D corporation, or may be fairly regarded as incidental to, or consequential on, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited (see *Halsbury's Laws of England* (4th Ed) para 1137, p 642).

E

[17] It is also settled law that jurisdiction exists, if at all, by virtue of statute and cannot be conferred by the parties. The Commission may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example a court of general jurisdiction. The Commission's powers, duties and authority are only those F conferred expressly or impliedly by statute.

[18] Section 30 of the Electricity Supply Act 1990 confers powers on the Commission to determine certain disputes between the plaintiff as the licensee and customers. The section reads as follows: G

Determination of dispute

30.(1) Any party to any dispute under sections 24 to 29 regarding a supply of electricity may refer the dispute to the Commission for the H decision of the Commission.

(2) The Commission shall determine the dispute and make an order accordingly:

I Provided that in a case where the Commission thinks fit the dispute may be determined by an arbitrator to be appointed by the Commission.

(3) The practice and procedure to be followed in the determination of any dispute under subsection (2) shall be such as the Commission may consider appropriate.

(4) Pending the determination to any dispute arising under sections 24 to 29 between a licensee and a person requiring a supply of electricity, the licensee shall continue to give the supply of electricity until the determination of the dispute.

(5) Any order under subsection (2) may include a provision requiring either party to pay the costs or expenses incurred by the Commission or the arbitrator, as the case may be, in determining the dispute.

[19] In my judgment, the dispute between the plaintiff and the defendant does come within s 24 of the Electricity Supply Act 1990. The section clearly states that the licensee (plaintiff) shall upon being required to do so by the owner of any premises, (in the case is the defendant):

(a) give a supply of electricity to those premises; and

(b) so far as may be necessary for that purpose, provide supply line or any electrical plant or equipment.

[20] It is not disputed that the present dispute arose as a result of a request made by the defendant for an increase in the supply of electricity to its premises. Reference is made to exh MO-2 in encl 11 which contains the application made by the defendant for an increase in the supply of electricity. This fact is further borne out in para 3.1 in exh MO-10 of encl 11 (Energy Commission report). The relevant paragraph reads as follows:

> Wakil TNB memaklumkan bahawa bekalan elektrik mula diberikan kepada Calsonic pada bulan Disember 2001 dengan maximum demand (MD) 1.734kw dari punca bekalan 22kv. Pada kira-kira bulan Oktober 2004, Calsonic telah meminta bekalan tambahan sebanyak 400w.

[21] Further, at para 3.16 of the minutes, it is stated that 'kedua-dua pihak diminta mengambil maklum bahawa pertikaian ini dikendalikan mengikut kehendak peruntukan Seksyen 30 Akta Bekalan Elektrik 1990'.

[22] Thus, it is clear from the minutes that the dispute is related to the supply of electricity and hence the Energy Commission was conferred with the jurisdiction to hear the dispute. The discovery of the undercharge came about as a result of the request for an increase in the electricity supply. Sub-section 6(1) of the Electricity Supply Act 1990 states that the Commission shall have the power to investigate the Commission of any offence under this Act or any regulation made thereunder. Further, sub-s 14(1)(d) and (e) of the Energy Commission Act 2001 empowered the Commission to implement and enforce the energy supply laws. The Commission is also empowered to regulate all matters relating to the

A electricity supply industry. Hence the contention by learned counsel for the plaintiff that disputes relating to undercharging of electricity under sub-reg 11(2) of the Licensee Supply Regulations 1990 does not fall within the Act is misplaced given the clear provision of the Act.

B

[23] Section 24 of the Energy Supply Act 1990 speaks about 'supply of electricity to those premises'. If there is a dispute regarding supply of electricity such as 'meter inaccuracy' or 'incorrect meter reading', any party to the dispute may refer the dispute to the Commission. In my judgment, any dispute regarding the supply of electricity as stipulated in sub-reg 11(2) of the C Licensee Supply Regulations 1990 will trigger the right to refer the dispute to the Commission for determination.

[24] The court may consider various aspects of the statute in attempting to D determine legislative intent. The court must first look at the intent as expressed in the language of the statute. When the language is plain and ambiguous, a court is bound to implement the expressed intent. Ordinary words are to be given their ordinary meaning without adding something that is not readily found in the statute or eliminating that which is readily found E therein (see, inter alia, *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph* [1993] 2 MLJ 57; [1993] 2 CLJ 417; *Cheatley v The Queen* (1972) 127 CLR 291, *Attorney-General for Canada & Anor v Hallet & Carey Ld & Anor* [1952] AC 427; *Bank of New Zealand & Ors v Cemac Modular Industries Ltd & Ors* [1972] NZLR 661 and *Farrell v Alexander* [1977] AC 59).

F

[25] The Commission clearly states that the determination was in accordance to s 30 of the Electricity Supply Act 1990. The Commission's interpretation should be accorded great weight deference. The reasons being:

G

(a) the Commission is charged by the Legislature to regulate the energy supply activities in Malaysia and to enforce the energy supply laws;

(b) the Commission employed its expertise or specialised knowledge in forming that interpretation; and

H

(c) the Commission's interpretation will provide uniformity in the application of the statute.

[26] This is called 'the doctrine of operative construction', the I interpretation of a statute by an administrative agency charged with the responsibility of enforcing that statute is entitled to judicial deference, especially if the agency is one of special competence and experience. In the instant case, all elements above are present. Therefore, the Commission's interpretation should be upheld. This interpretation also can ensure speedy

disposition of cases and to avoid protected litigation. Further, the dispute in the present case does not presents a complex or compelling legal and public policy issues.

[27] It should also be borne in mind that the plaintiff is a public company limited by shares. Its principle business is to generate and supply electricity. The plaintiff is the licensee and its relationship with customers and members of public is subject to control by authorities referred to in the relevant laws, including the Energy Commission.

[28] Learned counsel for the plaintiff further submitted that the decision of the Energy Commission is not binding upon parties because the Commission had acted in excess of its function and powers. Therefore, the decision arrived by the commission on 25 August 2005 ('the said decision') is ultra vires and hence it is invalid and cannot be relied upon. Learned counsel's arguments on this issue are merely a revisiting of her arguments on whether the Commission did have the authority to decide the present dispute which have been rejected earlier by the court in this judgment.

[29] It is submitted that although it can be argued that the failure on the part of the plaintiff to object against the proceedings before the Energy Commission arguably tantamount to a waiver and/or acquiescence, the same cannot be held against the plaintiff because the Energy Commission had acted in excess of its powers. Reference was made to *Halsbury's Laws of England* (4th Ed) Vol 1 at p 26:

> Para 24 Waiver and estoppel
>
> It is a general principle of law that an excess of statutory power cannot be validated by acquiescence in or failure to object to the excess, or by the operation of estoppel.

[30] Learned counsel posits that the passage from *Halsbury's* above, therefore, supports the plaintiff's contention that the plaintiff's earlier failure to object to the jurisdiction of the Energy Commission in deciding on undercharging of electricity charges cannot be held against the plaintiff and neither can it validate the ultra vires decision of the Energy Commission. The fact of the matter is that the Energy Commission had acted beyond its jurisdiction and hence the said decision is ultra vires.

[31] Further, the decision of the Commission is not final. During a meeting held by the Commission on the issue of 'back-billing' on 23 January 2007, which was attended by representative of the plaintiff but the representation of defendant was not invited; the Commission had

contradicted its earlier decision. By a letter dated 8 February 2007, the Commission had stated that the disputes pursuant to s 30 the Electricity Supply Act 1990 do not include 'back-billing' case.

[32] I pause here for a moment to say that learned counsel's contention is to be expected bearing in mind that the decision of the Commission was not in their favour and despite both parties had willingly submitted to the jurisdiction of the Commission to determine the dispute and the plaintiff being aided by their own legal officers at the hearing on 25 August 2005.

[33] The court is of the opinion that the decision of the Energy Commission was correctly decided and is not ultra vires as contended by learned counsel for the plaintiff based on the reasons enumerated above. I think, the plaintiff's attempt in contending that Energy Commission's decision was ultra vires is an afterthought. The plaintiff who was represented by legal officers at the meeting on 25 August 2005 at the Energy Commission actively took part in the proceedings and is bound by the finding of fact of the Energy Commission. It is common ground that the plaintiff did not make any complaint about the meeting. Neither did the plaintiff make any contemporaneous challenge as to the jurisdiction and authority of the Commission. Therefore, it is now not open to the plaintiff to contend that the doctrine of estoppel is not applicable on the grounds that the Energy Commission had acted ultra vires.

[34] The term 'acquiescence' is properly used where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable. The estoppel rests upon the circumstance that the person standing by in effect makes a misrepresentation as to a fact, namely, his own title; a mere statement that he intends to do something, for example to abandon his right, is not enough. Furthermore, equitable estoppel is not applied in favour of a volunteer (see *Halsbury's Laws of England* (4th Ed, Reissue) Vol 16(2), para 909, p 393).

[35] In my judgment, the plaintiff should be estopped from asserting that the decision is not binding on the plaintiff. It is a well recognised principle of equity that if a party is silent when he should speak, or supine when he

should act, he will not afterwards be permitted to either speak when he should be silent, or to act when he failed to do so at the first proper and opportune moment. In the circumstances of the case, the defendant's reliance on the conduct of the plaintiff as far as the meeting of the Commission is concerned is reasonable and in good faith. In the instant case, I am of the opinion that estoppel by silence arises because the plaintiff had the opportunity to make a challenge to the jurisdiction of the Commission but refrains from doing so, thereby leading the defendant to believe in an erroneous state of facts. A manifest intent to mislead is not required for estoppel by silence; its arises when the silence has the effect of misleading the defendant. Of course, silence by itself could not be interpreted as a waiver and/or estoppel. It does not mean anything unless there is an additional factor which together with the silence could be interpreted or inferred as a waiver and/or estoppel (see *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151; [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 and *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783; [2008] 1 CLJ 135). In the instant case, together with the silence, the plaintiff took part actively in the proceedings of the Commission. As such, I am of the view that there is act on the part of the plaintiff which could be constituted as an estoppel.

[36] Further, whilst asserting the decision of the Energy Commission is ultra vires, the plaintiff has found it fit to not challenge the decision of the Commission at an appropriate forum by way of judicial review. If plaintiff has any complaint about the decision of the Commission then, it should be addressed by way of judicial review. As I said earlier in this judgment, the Commission is a statutory body created by parliament. There is no doubt that the decision complained off falls within the public law sphere. Therefore, judicial review lies against the Commission. On this issue, Abdoolcader J (as he then was) had this say in *OSK & Partners Sdn v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179 at p 186; [1983] 1 CLJ 288 at p 291; [1983] CLJ 317 (Rep) at p 322:

> In the light of the provisions of the constating and governing instruments we have referred to and on an application of the principles of law we have adumbrated, it would appear that the Exchange is a hybrid corporation a company incorporated under the Companies Act but recognised and regulated by the Act and subject to its governance and authority with therefore an element of public flavour superimposed on the contractual element in relation to its members. It is a statutorily regulated entity under the overall direction and control of the Minister in fundamental respects, thus manifesting a distinctive public element which is reflected particularly in the requirements of the provisions of s 6(2)(b)(vi) and (c) which prescribe the public interest as the prime consideration. The exercise of disciplinary powers by the Exchange is conferred and prescribed by legislation under which the Minister is to approve the scope and type of such powers and the exercitation whereof would affect the livelihood of its members. Generally statutes regulating the several professions provide for a body to be established to exercise

A disciplinary powers over its members but under the Act the method of discipline is effected by delegating that power to a body not established by the Act itself but which must be approved by the Minister pursuant to and is controlled and subject to its provisions, and so it virtually comes to nothing.

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> We should perhaps add, anent the learned judge's assessment of its genre, that we cannot but express in the circumstances our view, pithily put perforce, that the Exchange is no more an exclusive business club than the Criminal Injuries Compensation Board (in explain which has been repeatedly applied since) can be said to be merely a welfare benefit society. The board in that case contended
C that it had no real authority as its decisions only gave people a better but unenforceable chance of receiving charity from the Crown, but the court said that this did not detract from its authority.

> The committee which is responsible for the management of the affairs of the
D Exchange is accordingly a body of persons having legal authority to determine the rights of persons licensed under the Act to carry on business as stock brockers and it follows that in purporting to exercise its disciplinary functions it necessarily has the duty to act judicially in the adhibition of that power and it is therefore subject to judicial review by way of certiorari and prohibition.

E

[37] In my opinion, the position of the Commission is not significally different compared with that of Kuala Lumpur Stock Exchange so as to exempt it from judicial review (see also *Ahmad Jefri bin Mohd Jahri @ Md*
F *Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773; [2008] MLJU 472).

[38] The plaintiff realises that they are out of time to file a judicial review on the decision of the Energy Commission and is now seeking to invalidate
G that decision in these proceedings which is not permissible. In the court's opinion, only in a judicial review can the court determine whether the decision of the Energy Commission was ultra vires of the Act. The plaintiff having failed to do so by judicial review is now precluded from raising this issue.

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[39] As regards the issue whether the decision of the Commission is final, the plaintiff's reliance on the minutes referred to in exh NMN-1 in encl 16 is misplaced for the following reasons:

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(a) The minutes of the meeting on 23 January 2007 is not a decision made pursuant to a dispute that was referred to the Energy Commission;

(b) The meeting that was held on 23 January 2007 was a meeting between the plaintiff and the Energy Commission. The defendant was not

informed of the meeting. There was a breach of the rules of natural justice when the defendant was not invited to be present at the meeting; and

(c) The doctrine of legitimate expectation.

[40] Having scrutinised carefully the minutes of the meeting on 23 January 2007, it revealed that the defendant was not present and neither given an opportunity to present its views. Since that meeting on 23 January 2007 was held to discuss the issues of billing related to the third parties and did not refer to the finding and decision of the Energy Commission between the parties that was decided on 25 August 2005, the decision of the said meeting should be disregarded.

[41] Concerning the doctrine of legitimate expection, Verma J said in *Food Corporation of India vs Kamadhenu Cattle Feed Industries* AIR 1993 SC 1601:

> There is no unfetted discreation in public law. A public authority possesses powers only to use them for public good. This impose the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

(See also *Law Pang Ching & Ors v Tawau Municipal Council* [2002] 3 MLJ 326; [2009] MLJU 41).

[42] The Commission is not free to change its mind with impunity. The principles governing legitimate expectation provide ample protection for the rights of the defendant.

[43] As for the letter dated 8 February 2007 referred to by learned counsel for the plaintiff in her submission, this letter appears to be general in nature and is not a decision made arising from the dispute that was referred to the Energy Commission. The decision of the Energy Commission between the plaintiff and the defendant made on 25 August 2005 had not been challenged nor set aside by the plaintiff. In the circumstances, the plaintiff cannot and

A should not be permitted to rely on these minutes.

CONCLUSION

B **[44]** In the upshot, the court granted order in terms of the defendant's application to encl 12 with costs.

Defendant's application allowed with costs.

C Reported by Kohila Nesan

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